

**Gary Enterprises, Inc., Gary Coal Sales, Inc., a Single Employer and United Mine Workers of America. Cases 9-CA-30484 and 9-CA-30694**

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

Upon a charge filed by United Mine Workers of America (the Union), on March 15, 1993, in Case 9-CA-30484, an amended charge filed on April 2, 1993, in the same case, a charge filed by the Union on May 12, 1993, in Case 9-CA-30694, and an amended charge filed May 19, 1993, in the same case, the General Counsel of the National Labor Relations Board issued a consolidated complaint against Gary Enterprises and Gary Coal Sales, Inc. (referred to individually as Respondent Gary Enterprises and Respondent Gary Coal Sales, and collectively as the Respondents), alleging that they have violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charges and the consolidated complaint, the Respondent failed to file an answer.

On July 29, 1993, the General Counsel filed a Motion for Summary Judgment with the Board. On August 5, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

**Ruling on Motion for Summary Judgment**

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the consolidated complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the consolidated complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that counsel for General Counsel, on July 15, 1993, by certified and regular mail, notified Respondent of its obligation to file an answer to the consolidated complaint and advised that unless it filed an answer by close of business July 22, 1993, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent Gary Enterprises, a corporation, has been engaged in the operation of a coal mine in

McDowell County, West Virginia. During the 12-month period ending June 25, 1993, Respondent Gary Enterprises, in conducting its operations described above, sold and shipped from its McDowell County, West Virginia facility goods valued in excess of \$50,000 directly to points outside the State of West Virginia. At all material times, Respondent Gary Coal Sales, a corporation, has been engaged in the operation of a coal mine in McDowell County, West Virginia. During the 12-month period ending June 25, 1993, Respondent Gary Coal Sales, in conducting its operations described above, sold and shipped from its McDowell County, West Virginia facility goods valued in excess of \$50,000 directly to points outside the State of West Virginia. At all material times, Respondent Gary Enterprises and Respondent Gary Coal Sales each have been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times, Respondent Gary Enterprises and Respondent Gary Coal Sales have been affiliated business enterprises with common officers, ownership, management, and supervision; have formulated and administered a common labor policy affecting employees at said operations; have shared common premises and facilities; have provided services to each other; and have interchanged personnel with each other. By virtue of these operations, Respondent Gary Enterprises and Respondent Gary Coal Sales constitute a single business enterprise and a single employer within the meaning of the Act. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

All employees of the Respondents at their McDowell County, West Virginia operations covered under article 1(A) of the National Bituminous Coal Wage Agreement of 1988 (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. Since February 19, 1988, and at all material times, the Union has been the designated collective-bargaining representative of the unit, and since then, the Union has been recognized as the representative by the Respondents. This recognition has been embodied in the collective-bargaining agreement (National Bituminous Coal Wage Agreement of 1988) effective through February 1, 1993, and extended by agreement of the parties pending negotiation of a new collective-bargaining agreement. At all times since February 1988, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

About September 15, 1992, Respondents failed to continue in effect all the terms and conditions of the collective-bargaining agreement described above for the unit employees employed at the coal mine operated

by Respondent Gary Enterprises at Gary, West Virginia, by failing to pay contractually required benefits including graduated vacation days, holidays, sick days, vacation days, personal days, and floating days. About January 18, 1993, the Respondents entered into a written grievance settlement under the terms of which the Respondents agreed to make employees whole for the failure to provide benefits described above and additional benefits it failed to pay beginning on August 25, 1992. About January 28, 1993, the Respondents informed the Union that they would not abide by the grievance settlement described above and have since that time failed to make payments to employees as required by that grievance settlement agreement. About April 23, 1993, Respondents failed to continue in effect all the terms and conditions of the collective-bargaining agreement described above for the unit employees employed at coal mine #4 operated by Gary Coal Sales at Thorpe, West Virginia, by failing to pay contractually required benefits, including regular wages, graduated vacation days, holidays, sick days, vacation days, personal days, and floating days, and by failing to provide appropriate medical insurance and medical expenses. About May 13, 1993, Respondents failed to continue in effect all the terms and conditions of the collective-bargaining agreement for the unit employees employed at coal mine #4 operated by Respondent Gary Coal Sales at Thorpe, West Virginia, by failing to remit to the Union union dues and assessments deducted from unit employees' paychecks under the dues-deduction and checkoff provisions of the collective-bargaining agreement. Respondents engaged in the conduct described above without the Union's consent. The terms and conditions of employment described above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

#### CONCLUSION OF LAW

By the conduct described above, the Respondents have been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representatives of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(1) and (5) of the Act, and have thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondents have violated Section 8(a)(5) and (1) by failing to make contractually

required payments for regular wages, graduated vacation days, holidays, sick days, vacation days, personal days, and floating days, and by failing to provide appropriate medical insurance and medical expenses, we shall order the Respondents to make whole their unit employees by making all payments that have not been made and that would have been made but for the Respondents' unlawful failure to make them, including any additional amounts applicable to such delinquent payments as determined in accordance with the criteria set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). We shall order the Respondents to provide medical insurance to the unit employees as required by the collective-bargaining agreement, and to make the unit employees whole by reimbursing them for any expenses they may have incurred as a result of the Respondent's failure to do so, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, the Respondents shall reimburse unit employees for any other expenses ensuing from their failure to make such other required payments, as set forth in *Kraft Plumbing & Heating*, supra, such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra. With regard to the Respondents' failure to remit dues and assessments deducted from unit employees' paychecks, we shall order the Respondents to remit to the Union all authorized dues and assessments that they failed to remit since May 13, 1993, under the dues-deduction and checkoff provisions of the collective-bargaining agreement, with interest as provided in *New Horizons for the Retarded*, supra.

#### ORDER

The National Labor Relations Board orders that the Respondents, Gary Enterprises, Inc. and Gary Coal Sales, Inc., a Single Employer, McDowell County, West Virginia, their officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Failing to continue in effect all the terms and conditions of the National Bituminous Coal Wage Agreement of 1988, effective through February 1, 1993, and extended by the agreement of the parties pending negotiations of a new collective-bargaining agreement, for the unit employees employed by Respondent Gary Enterprises, Inc. at Gary, West Virginia, by failing to pay contractually required benefits including graduated vacation days, holidays, sick days, vacation days, personal days, and floating days. The appropriate unit includes:

All employees of Respondents at their McDowell County, West Virginia operations covered under Article 1(A) of the National Bituminous Coal Wage Agreement of 1988.

(b) Informing United Mine Workers of America that Respondents will not abide by the written grievance settlement entered into about January 18, 1993, or failing to make payments to employees as required by that grievance settlement agreement.

(c) Failing to continue in effect all the terms and conditions of the collective-bargaining agreement for the unit employees employed at coal mine #4 operated by Gary Coal Sales at Thorpe, West Virginia, by failing to pay contractually required benefits, including regular wages, graduated vacation days, holidays, sick days, vacation days, personal days, and floating days, or by failing to provide appropriate medical insurance and medical expenses.

(d) Failing to continue in effect all the terms and conditions of the collective-bargaining agreement for the unit employees employed at coal mine #4 operated by Respondent Gary Coal Sales at Thorpe, West Virginia, by failing to remit to the Union union dues and assessments deducted from unit employees' paychecks under the dues-deduction and checkoff provisions of the agreement.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make unit employees whole for any loss of benefits or other expenses suffered as a result of the Respondents' failure to make contractually required payments for regular wages, graduated vacation days, holidays, sick days, vacation days, personal days, and floating days, and by failure to provide appropriate medical insurance and medical expenses, and failure to remit to the Union dues and assessments deducted from unit employees' paychecks, in the manner set forth in the remedy section of this decision.

(b) Remit to the Union all union dues and assessments deducted from unit employees' paychecks under the dues-deduction and checkoff provisions of the collective-bargaining agreement that Respondents failed to remit since May 13, 1993, in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in McDowell County, West Virginia, copies of the attached notice marked "Ap-

pendix."<sup>1</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

Dated, Washington, D.C. August 31, 1993

James M. Stephens, Chairman

Dennis M. Devaney, Member

John Neil Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>1</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to continue in effect all the terms and conditions of the National Bituminous Coal Wage Agreement of 1988, effective through February 1, 1993, and extended by the agreement of the parties pending negotiations of a new collective-bargaining

agreement, for the unit employees employed by Gary Enterprises, Inc. at Gary, West Virginia, by failing to pay contractually required benefits including graduated vacation days, holidays, sick days, vacation days, personal days, and floating days. The appropriate unit includes:

All employees at our McDowell County, West Virginia operations covered under Article 1(A) of the National Bituminous Coal Wage Agreement of 1988.

WE WILL NOT inform United Mine Workers of America that we will not abide by the written grievance settlement entered into about January 18, 1993, or fail to make payments to employees as required by that grievance settlement agreement.

WE WILL NOT fail to continue in effect all the terms and conditions of the collective-bargaining agreement for the unit employees employed at coal mine #4 operated by Gary Coal Sales at Thorpe, West Virginia, by failing to pay contractually required benefits, including regular wages, graduated vacation days, holidays, sick days, vacation days, personal days, floating days, or by failing to provide appropriate medical insurance and medical expenses.

WE WILL NOT fail to continue in effect all the terms and conditions of the collective-bargaining agreement

for the unit employees employed at coal mine #4 operated by Respondent Gary Coal Sales at Thorpe, West Virginia, by failing to remit to the Union all dues and assessments deducted from unit employees' paychecks under the dues-deduction and checkoff provisions of the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make unit employees whole, with interest, for any loss of benefits or other expenses suffered as a result of our failure to make contractually required payments for regular wages, graduated vacation days, holidays, sick days, vacation days, personal days, or floating days, our failure to provide appropriate medical insurance and medical expenses, or our failure to remit to the Union all dues and assessments deducted from unit employees' paychecks.

WE WILL remit to the Union all dues and assessments deducted from unit employees' paychecks under the dues-deduction and checkoff provisions of the collective-bargaining agreement that we failed to remit since May 13, 1993, with interest.

GARY ENTERPRISES, INC., GARY COAL  
SALES, INC., A SINGLE EMPLOYER